

memorandum

DATE MAY 22 1984

REPLY TO
ATTN OF DP-3.1

SUBJECT ACTION: Radiation Litigation Support Plan

TO The Secretary

THRU: Special Assistant to the Secretary for Policy and
Programs

ISSUE:

Whether or not to establish an organizational policy for the management support and funding allocation of the defense of pending radiation litigation brought against the United States and its contractors.

BACKGROUND:

During the last few years, more than 54 separate cases have been filed in Federal and civil courts representing more than 5200 plaintiffs alleging personal injury, wrongful death, and property damage due to nuclear tests. The claims total in excess of \$5 billion for damages and another \$4 billion in punitive damages against contractors. The plaintiffs are civilian and military test participants, persons living near the Nevada Test Site (NTS), uranium miners, those living near the mill tailings sites, Marshall Islands inhabitants and survivors.

Two cases were filed by more than 2500 Marshall Islanders against the Board of Regents of the University of California, Battelle Northwest, Sandia Corporation, Western Electric Company, and Brookhaven National Laboratory. These cases arise out of atmospheric testing of nuclear devices in the Pacific and follow-on contractor activities on behalf of DOE and its predecessor agencies. In view of recent acceptance by the people of the Marshall Islands of a compact with the U.S., the number of suits by Marshallese may be substantially if not wholly eliminated.

A growing number of suits are being filed against DOE contractors by ex-servicemen or their heirs alleging injury or death as a result of radiation received while participating in atmospheric tests in the Pacific or at NTS. Since in excess of some 300,000 servicemen and civilians participated in such tests and the normal incidence of cancer deaths exceeds 16 percent of the U.S. population where no exposure to "excessive" radiation is known, the number of potential cases is extremely high at this time.

Some of the damage claims are based on the contention that as low as 5 rem exposure to fallout was the cause of fatal cancers. If these cases are successfully pursued by the plaintiffs, the resulting impact on current

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underground testing of nuclear weapons and the civilian nuclear industry could be significant. It could open the way for those opposing any nuclear activity to bring their opinions to bear through the judicial system to delay or halt a particular operation when exposure levels are alleged to be above those found by the courts to have been the cause of injury in the atmospheric testing cases. If the courts find in favor of such claims, it would certainly have a deleterious impact on all other radiation injury claim areas including worker's compensation where 5 rem per year is the radiation worker's standard.

In response to the need to make large numbers of AEC records available to the public, the Secretary, at the request of the Assistant Secretary for Defense Programs, established a Coordination Information Center (CIC) in Las Vegas, Nevada, to house declassified documents. The center, while not designed as a litigation support facility, has been used by counsel both for plaintiffs and defendants, as a source of documents for trial preparation. Currently, field offices and contractors are responding on ad hoc bases, duplicating records collection and hiring legal firms to litigate largely the same issues, with no overall capability to estimate and budget for funds or to manage available resources.

Actions have been taken to coordinate litigation support activities. An informal litigation support working group was called together in January 1983 by the Deputy Assistant Secretary for Defense Programs at the suggestion of the Assistant General Counsel for General Litigation. A second meeting was held in May 1983. These meetings resulted in significantly increased coordination and exchange of information among program and field offices. Additionally, the Nevada Operations Office hosted a three-day Attorney Briefing Program in Las Vegas and at the NTS in late March 1983. In June 1983, Defense Programs approved initial funding for the Litigation Support Team (LST) proposed by the Nevada Operations Office. The principal mission of the LST is to serve as a resource for lead trial attorneys. Specific functions include interfacing with CIC to obtain required documents, identifying technical resources and expert witnesses, developing profiles of witnesses, developing draft answers to interrogatories, and providing logistic support. The LST operation was put in place in August 1983.

DISCUSSION:

As the diversity of cases expands, it is apparent that an administrative structure for litigation support will be required. The possibility exists that due to the overwhelming task of preparing for the peak number of cases, some going back over 30 years, the Government's defense could fail from the lack of supporting resources and not because of the merits of the cases. The difficulty arises in attempting to locate authority and

responsibility in any one DOE organizational area. Certainly, the Office of General Counsel (OGC) has the responsibilities in the defense of these cases. However, OGC has neither the manpower nor the financial resources required to prepare for the large potential number of cases nor does it have the requisite technical knowledge to judge the potential merit of the medical claims. The required support includes:

1. Document identification, collection and referral indexing.
2. Paralegal and clerical assistance in preparing for the cases.
3. Outside attorneys' time in defending contractor cases.
4. Computer hardware necessary for document storage, retrieval and transmission.
5. Logistical support including transportation, per diem, trial site office space and office equipment.

To date, Defense Programs has carried the largest portion of the funding support. Personnel requirements are being met by additional duties added to existing staff and contractor assistance. Energy Research and Policy, Safety and Environment have assisted in providing expert knowledge and research support in areas related to health effects and dosimetry of ionizing radiation.

Due to the number and schedule for forthcoming litigation cases, there is a requirement to provide the proper level of support on a priority basis. The planning and administrative management for radiation litigation support should be expeditiously accomplished by a Headquarters Radiation Litigation Support Group, chaired by Defense Programs with representatives from the Office of the General Counsel; the Assistant Secretarial Offices of Energy Research and Policy, Safety and Environment; the Office of the Controller; Management and Administration; and the Executive Secretariat (Historian's Office).

The functions of the Support Group would reflect:

1. Departmental recognition that radiation litigation support is a major issue for resource allocation.
2. The requirement to develop a DOE wide strategy for supporting the OGC in its management of the litigation.
3. The need to establish responsibility for funding and providing resources within the Department of Energy for the support of radiation litigation.
4. Coordinated program and field office assets and needs to best utilize DOE's available resources and preclude duplication.

Regional trial support will, of necessity, be accommodated by a DOE organization in a geographically suitable location as arranged by the Radiation Litigation Support Group.

Operationally, the Support Group will call upon personnel and expertise of the Headquarters and field office staffs and the contractors to provide the assistance to the litigation activities both at the DOE and DOJ level as well as the field office and contractor level. Out-year requirements would be identified and the participating program offices would budget for the share allocated for their support through the normal budget review and approval process. Funds would be disbursed to field offices and contractors involved in each program office activity.

ALTERNATIVES:

Option A: To continue radiation litigation support on an ad hoc basis.

Pro:

1. Various organizational elements within the Department have experience in supporting litigation.
2. No continuing staff effort would be identified in any Headquarters program office.

Con:

1. Increases the likelihood of losing the pending suits without regard for the merits of the cases.
2. Without consistent technical and archival support, the defense of radiation compensation suits will be jeopardized.
3. Less coordination among defense lawyers, program offices and contractor counsel.
4. Difficult funding estimation and justification.
5. Duplication in records collection and law firms.
6. Unplanned diversion of manpower and funding resources away from program mission.